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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

JOHN LOUIS VISCIOTTI, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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"CAPITAL CASE"

QUESTIONS PRESENTED

1. Whether, under AEDPA, a state court decision is "contrary to" United States Supreme Court precedent (28 U.S.C. § 2254(d)(1)) when it quotes and cites the proper standard to be applied from the controlling Supreme Court authority, but in discussing the issue also uses a single word as a shorthand term for that standard, which, when considered in isolation, can be interpreted as stating an incorrect standard?

2. In determining under AEDPA, whether a state court decision is an unreasonable application of United States Supreme Court precedent (28 U.S.C. § 2254 (d)(1)), may a federal court assume a state court did not consider relevant matters because the state court did not expressly state it considered the matters, even if the state court discusses the matters in another part of its written decision, such as in a review of the evidence from lower court proceedings or a review of the petitioner's allegations?

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IN THE SUPREME COURT OF THE UNITED STATES

No. _____

JEANNE WOODFORD, Warden, *Petitioner,*

v.

JOHN LOUIS VISCIOTTI, *Respondent.*

_____

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, Appendix A at 1, is reported at 288 F.3d 1097 (9th Cir. 2002). The order of the District Court granting habeas corpus relief from Respondent Visciotti's death sentence, Appendix B at 75, is unreported. The opinion of the California Supreme Court finding no ineffective assistance of counsel at the guilt or the penalty phase trials and denying Visciotti's petition for a writ of habeas corpus is reported at 14 Cal. 4th 325, 926 P.2d 987, 58 Cal. Rptr. 2d 801 (1996), and is contained in Appendix D.

JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on April 24, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. section 1254(1).

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. section 2254(d)(1):

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved in an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

On November 8, 1982, Visciotti and his roommate, Brian Hefner, had been fired by their employer for whom they sold burglar alarms door to door. In order to get more money to cover future rent and to buy drugs, they planned to rob fellow employees. Visciotti lured Timothy Dykstra and Michael

Wolbert to drive them to a remote area of Orange County by telling Dykstra and Wolbert that there was a party with two extra girls. Visciotti directed Wolbert where to drive and asked him to stop so Visciotti could relieve himself. They stopped in a remote area and everyone got out of the car. Visciotti pulled a gun from his waistband and demanded Dykstra and Wolbert's wallets. After Hefner got their money from the car where they had hidden it, Visciotti raised the gun and shot Dykstra from approximately three to four feet away. The bullet grazed Dykstra's heart and penetrated his right lung. Dykstra fell immediately. Visciotti then approached Wolbert, raised the gun in both hands and shot Wolbert in the torso. Wolbert fell, and Visciotti stood at Wolbert's feet and shot Wolbert in the left shoulder from about three feet away. Visciotti started to walk away, and Wolbert rose and approached him. Visciotti turned and shot Wolbert through the left eye from approximately two feet away. Wolbert saw Visciotti make eye contact and pull back the hammer of the gun to cock it before he shot. Visciotti and Hefner drove away, leaving the two victims to die. Passers by later came to their assistance. When paramedics arrived Dykstra was dead. Wolbert was hospitalized and underwent surgery. He identified his assailants as fellow employees. The morning after the shooting, Wolbert identified both Visciotti and Hefner in a photographic line-up. He identified Visciotti as the shooter.

Approximately 9:00 a.m. the morning after the murder, Visciotti and Hefner were arrested. Later that day, Visciotti confessed on video tape and later participated in a video taped re-enactment of the crime at the crime scene. A sample of his blood was taken that same day and it revealed cocaine and benzoylecgonine, a metabolite of cocaine, and no other controlled substances.

Visciotti was represented at trial by retained counsel, Roger Agajanian. Following jury trial, he was convicted of the murder of Timothy Dykstra, the attempted murder of Michael Wolbert, and the robbery of both. Cal. Penal Code §§§ 187, 664/187, and

211, respectively. The jury also found that Visciotti personally used a firearm in the commission of the crimes, that he intentionally murdered Dykstra, and that he committed the murder during the commission of the crime of robbery. Three days later a penalty phase trial began. On the third day of that trial, the jury retired to deliberate. Two days later they returned a verdict of death.

Visciotti's convictions and death sentence were affirmed by the California Supreme Court. *People v. Visciotti*, 2 Cal. 4th 1, 825 P.2d 388, 5 Cal. Rptr. 2d 495 (1992). On October 5, 1992, this Court denied Visciotti's petition for writ of certiorari. *Visciotti v. California*, 506 U.S. 893 (1992). Visciotti subsequently filed a habeas petition in the California Supreme Court alleging, inter alia, ineffective assistance of counsel at both the guilt phase and the penalty phase trials. The California Supreme Court issued an order to show cause on the claim of ineffective assistance of counsel at the penalty phase trial and ordered an evidentiary hearing and appointed a Superior Court judge as a referee to take evidence and make findings of fact on seven questions. *In re Visciotti*, 14 Cal. 4th at 329, 335-36; Appendix D at 80, 95-97. At the evidentiary hearing, Visciotti presented the evidence which he argued should have been presented in mitigation at his penalty phase trial. Other evidence was presented as well. *In re Visciotti*, 14 Cal. 4th at 336-45; Appendix D. at 97-122.

The California Supreme Court decided the claim of ineffective assistance of counsel at the penalty phase pursuant to a method approved by this Court in *Strickland v. Washington*, 466 U.S. 668, 697 (1984), by determining the issue of prejudice without determining whether trial counsel's performance was deficient. The California Supreme Court found there was no prejudice from any deficient performance and denied the petition for writ of habeas corpus. *In re Visciotti*, 14 Cal. 4th at 330, 353, 356-57; Appendix D. at 82, 142, 150-51. On June 27, 1997, this Court denied Visciotti's petition for writ of certiorari. *Visciotti v. California*, 521 U.S. 1124 (1997).

Visciotti filed a federal habeas corpus petition in June 1998, alleging, inter alia, ineffective assistance of counsel at the guilt phase and the penalty phase of trial. The district court granted an evidentiary hearing on Visciotti's claim of ineffective assistance of trial counsel at the guilt phase of trial and on allegations of conflict of interest and incompetence to stand trial. No evidentiary hearing was granted on Visciotti's claim of ineffective assistance of counsel at the penalty phase of the trial, because there had been a full and fair hearing on that issue in the state court. Appendix C at 78-79. At the conclusion of the evidentiary hearing, the district court ruled the petition would be granted as to the claim of ineffective assistance of counsel at the penalty phase and denied as to all other claims. Judgment in accordance with that ruling was subsequently entered. Appendix B. Petitioner Woodford appealed the grant of the petition and Respondent Visciotti appealed the denial of the petition as to the claim of ineffective assistance of counsel at the guilt phase of the trial. The Ninth Circuit unanimously affirmed the district court's decision to grant habeas relief on the claim of ineffective assistance of counsel during the penalty phase, and by a vote of 2-1 affirmed the district court's decision to deny habeas relief on the claim of ineffective assistance of counsel during the guilt phase. *Visciotti v. Woodford*, 288 F.3d. 1097 (9th Cir. 2002); Appendix A at 1.

REASONS FOR GRANTING THE WRIT

A. Introduction

Petitioner Woodford asks this Court to grant this Petition for Writ of Certiorari to clarify that under 28 U.S.C. section 2254(d)(1) the mere use of a shorthand term for a legal standard under this Court's precedent, or failure to explicitly mention every possible relevant matter in the discussion of the determination of an issue under this Court's precedent, will not

jeopardize state court decisions. The Ninth Circuit Court of Appeals erroneously found the California Supreme Court's rejection of Visciotti's state habeas claim of ineffective assistance of counsel at the penalty phase was "contrary to," and "an unreasonable application of" the standard for prejudice in *Strickland*.

The only way the Ninth Circuit was able to find the California Supreme Court decision was "contrary to" the holding of *Strickland* was to completely ignore the California Supreme Court's recitation of the proper standard and citation to *Strickland* and to treat the California Supreme Court's use of a shorthand term for that standard as the California Supreme Court's sole statement of the standard. Likewise, the method by which the Ninth Circuit found the California Supreme Court unreasonably applied the prejudice standard of *Strickland* was to assume the California Supreme Court did not consider relevant matters if it did not expressly state it considered them in its discussion of prejudice. The Ninth Circuit made this assumption despite the fact the California Supreme Court discussed the matters in an earlier part of its written decision.

The Ninth Circuit's method in both instances was contrary to the deferential standard of review required under 28 U.S.C. section 2254(d)(1). Under that standard the Ninth Circuit should have accorded deference to the California Supreme Court's decision and looked at the entirety of the California Supreme Court decision to see if it could reasonably be construed in a way that upheld the decision. Instead the Ninth Circuit looked at only portions of the California Supreme Court's decision which the Ninth Circuit could use to find fault with it. Certiorari should be granted to clarify the deferential standard that must be applied by the federal courts under AEDPA. State court rejections of claims of violation of federal constitutional rights should not be jeopardized by the use of shorthand terms for a legal standard or by failure to explicitly mention every possible relevant matter in the discussion of the determination of an issue.

B. AEDPA Requires Deference To The State Court Adjudication On The Merits

Because Visciotti filed his federal habeas petition after April 24, 1996, it is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lindh v. Murphy*, 521 U.S. 320, 336-38 (1997).

The relevant provision of that act, 28 U.S.C. section 2254(d)(1), states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

A state court's decision is "contrary to" Supreme Court precedent if the state court "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law. *Williams v. Taylor*, 529 U.S. 362, 405, 412-13 (2000); *Bell v. Cone*, ___ U.S. ___, 122 S. Ct. 1843, 1850, 152 L. Ed. 2d 914 (2002), slip op. at 7. A state court's decision is also "contrary to" Supreme Court precedent if the state court confronts a set of facts that is materially indistinguishable from a Supreme Court decision and nevertheless arrives at a result different from Supreme Court precedent. *Williams*, 529 U.S. at 405, 412-13; *Bell*, 122 S. Ct. at 1850, slip op. at 7.

A state court's decision may be an "unreasonable application" of Supreme Court precedent if the state court either (1) identifies the correct governing legal rule, but unreasonably applies it to a new set of facts in a way that is objectively

unreasonable; or (2) extends or fails to extend a clearly established legal principle to a new context in a way that is objectively unreasonable. *Williams*, 529 U.S. at 407-08; *Bell*, 122 S. Ct. at 1850, slip op. at 7. A federal court may not grant habeas relief, even where it concludes a state court applied "clearly established federal law erroneously or incorrectly," unless the state court also applied the law unreasonably. *Williams*, 529 U.S. at 410; *Bell*, 122 S. Ct. at 1850, slip op. at 7.

This Court has noted that section 2254(d) constitutes a "new, highly deferential standard for evaluating state court rulings." *Lindh*, 521 U.S. at 333 n.7. The 1996 act modified the role of federal habeas courts to, inter alia, "ensure that state-court convictions are given effect to the extent possible under law." *Bell*, 122 S. Ct. at 1849, slip op. at 6, *citing Williams*, 529 U.S. at 403-04.

C. The Ninth Circuit Court Of Appeals Finds The California Supreme Court Decision Was "Contrary To" *Strickland* Only By Focusing Solely On The California Supreme Court's Use Of A Shorthand Term For The Prejudice Standard And Ignoring The California Supreme Court's Recitations Of The Proper Standard For Determining Prejudice

The California Supreme Court stated the proper standard for evaluating prejudice on a claim of ineffective assistance of counsel from this Court's decision in *Strickland v. Washington*, cited *Strickland*, and applied the correct standard. The Ninth Circuit ignores that expression of the proper standard, takes the California Supreme Court's shorthand term for that standard as the only standard expressed or used by the California Supreme Court, and consequently finds the California Supreme Court's decision was "contrary to" *Strickland*. By ignoring the California Supreme Court's citation and use of the proper

standard, and by misconstruing the California Supreme Court's shorthand term, the Ninth Circuit has seriously undermined the "highly deferential" standard mandated by AEDPA. *Lindh*, 521 U.S. at 333 n.7. It has not given the California Supreme Court's decision effect "to the extent possible under law." *Bell*, 122 S. Ct. at 1849, slip op. at 6. It has done just the opposite.

The Ninth Circuit holds that the California Supreme Court's rejection of Visciotti's claim of ineffective assistance of counsel at the penalty phase was "contrary to" this Court's *Strickland* precedent. *Visciotti v. Woodford*, 288 F.3d 1097, 1108-09 (9th Cir. 2002), Appendix A at 36-37. The Ninth Circuit finds the California Supreme Court "mischaracterized" the prejudice standard from *Strickland*, 466 U.S. 668 by using a standard of whether it was "probable" there would have been a different result absent deficient performance by trial counsel rather than the correct standard from *Strickland* of whether there was a "reasonable probability" of a different result. *Visciotti v. Woodford*, 288 F.3d at 1108-09, Appendix A at 36-37. In support of this finding, the Ninth Circuit quotes three instances of the use of the word "probable" in the state decision rather than "reasonable probability." *Id.* at 1109 n.11, Appendix A at 36.[1] However, the Ninth Circuit completely ignores the fact that the California Supreme Court twice recited the "reasonable probability" standard while citing *Strickland*, made other references to *Strickland*, and quoted other expressions of the prejudice standard from *Strickland*.

The California Supreme Court identified *Strickland* as the controlling authority and correctly stated that Visciotti was required to show trial counsel rendered deficient performance and "a reasonable probability" that, but for such deficient performance, there would have been a "more favorable outcome." *In re Visciotti*, 14 Cal.4th at 352, citing *Strickland*

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1. In fact, the California Supreme Court used the term "probable" four times in this context. *In re Visciotti*, 14 Cal.4th at 330, 355 (twice), 356, App. D. at 82, 146, 146, 150.

466 U.S. at 694 and state court cases, Appendix D at 138-39. The California Supreme Court further correctly stated that prejudice required the petitioner to establish the trial was rendered "unreliable or fundamentally unfair" by counsel's deficient performance. *In re Visciotti*, 14 Cal.4th at 352 (citation omitted), Appendix D at 138-39. The decision then correctly quoted *Strickland* for the proposition that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *In re Visciotti*, 14 Cal.4th at 352, quoting *Strickland*, 466 U.S. at 686, Appendix D at 139. The California Supreme Court also referred to a standard of "'undermine confidence in the outcome,'" a term used in *Strickland*, 466 U.S. at 694. *In re Visciotti*, 14 Cal.4th at 354. Appendix D at 143. The California Supreme Court also correctly noted the issue was whether there was a "reasonable probability" that absent counsel's deficient performance, the sentencer "would have found that the balance of aggravating and mitigating factors did not warrant imposition of the death penalty." *In re Visciotti*, 14 Cal. 4th at 352, citing *Strickland*, 466 U.S. at 696, Appendix D at 139. The Ninth Circuit inexplicably and egregiously fails to mention this language and citations in the California Supreme Court decision. Moreover, the Ninth Circuit does not attempt to harmonize the California Supreme Court's use of the terms "probable" and "reasonable probability" in referring to the standard for determining prejudice under *Strickland*.

Under section 2254(d)(1)'s "highly deferential standard" of review, *Lindh*, 521 U.S. at 333 n.7, the Ninth Circuit should have considered the fact that the California Supreme Court decision stated the correct standard of "reasonable probability," and should have attempted to harmonize the California Supreme Court's use of the two terms. It is logical and, under AEDPA, required, that the entirety of the state court decision be considered. That decision should be construed in a manner to give effect to the decision "to the extent possible under law."

Bell, 122 S. Ct. at 1849, slip op. at 6, citing *Williams*, 529 U.S. at 403-04. The Ninth Circuit instead focused only on the shorthand term ("probable") used in the California Supreme Court decision, viewed that term in isolation, and misconstrued it as stating a standard "contrary to" *Strickland*. This method is both illogical and completely at odds with the deference requirement of section 2254(d)(1). Not surprisingly, the Ninth Circuit reaches an incorrect result.

The California Supreme Court quoted and applied the proper standard of "reasonable probability;" its use of the term "probable" was merely shorthand for the "reasonable probability" standard of *Strickland*. Use of such shorthand terms is common in written decisions. At one point in *Williams*, 529 U.S. 362, the Court's opinion expressed the prejudice standard for ineffective assistance of counsel as requiring that a petitioner show that counsel's deficient performance "*probably* affected the outcome of the proceeding." *Williams*, 529 U.S. at 393, emphasis added. Likewise, the *Strickland* opinion itself in one instance uses the term "reasonably likely" in referring to the prejudice standard. *Strickland*, at 696.[2]

In *Mickens v. Taylor*, __ U.S. __, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), the majority opinion used the term "probable" in discussing the prejudice standard under *Strickland*. The majority opinion in *Mickens* stated "defects in assistance that have no *probable* effect upon the trial's outcome do not establish a constitutional violation." *Mickens*, at 1240, slip op. at 3,emphasis added. The majority opinion then noted the general rule for prejudice is that there must be "'a reasonable probability'" of a different result. *Id.*, quoting *Strickland*, 466 U.S. at 694. The majority opinion used the term "*probable*

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2. The opinion stated that in determining prejudice, the question is whether the petitioner has shown "that the decision reached would *reasonably likely* have been different . . ." absent trial counsel's errors. *Strickland*, 466 U.S. at 696, emphasis added.

effect upon the outcome" twice more in referring to the test for prejudice. *Mickens*, at 1241, 1245, slip op. at 3, 11, emphasis added. These references in *Williams*, *Strickland*, and *Mickens* no more demonstrate an incorrect statement of the prejudice standard than the California Supreme Court's shorthand references at certain points to "probable."

Moreover, the majority opinion in *Mickens* noted this Court's earlier use of a shorthand term for a legal standard. The majority opinion in *Mickens* stated this Court's use of the term "'an actual conflict of interest'" in a remand order in *Wood v. Georgia*, 460 U.S. 261, 273 (1981) was shorthand for the language in *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) that "'a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.'" *Mickens*, 122 S. Ct. at 1243, slip op. at 8-9. The use of a shorthand term for a legal standard is proper; it does not constitute use of an improper standard or make the California Supreme Court's decision "contrary to" *Strickland* under AEDPA.

When this Court determined the state court decision in *Williams* was contrary to the *Strickland* standard, this Court discussed fully and fairly the state court's decision on the issue, *Williams*, 529 U.S. at 371-72, 391-94, 397. It did not take phrases out of context, or ignore other correct state court references, as the Ninth Circuit did here. In contrast, the Ninth Circuit concluded the California Supreme Court mischaracterized the standard as "probable" rather than "reasonable probability," and offered only a one paragraph footnote reference to the state court decision's discussion of the issue. In that single paragraph the Ninth Circuit neither quoted nor even mentioned the California Supreme Court's express statements of the proper standard. *Visciotti v. Woodford*, 288 F.3d at 1109 n.11.

Review of the California Supreme Court concurring and dissenting opinions also makes clear that that court applied the proper prejudice standard under *Strickland*. Both dissenting

opinions took issue with the majority as to whether a presumption of prejudice applied under this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984). *In re Visciotti*, 14 Cal.4th at 360-61 (Mosk, J., dissenting), 362-63 (Brown, J., dissenting), Appendix D at 161-65, 168. However, the dissenters did not take issue with the majority's characterization of the prejudice standard under *Strickland*. Had the dissenting justices believed that the majority was applying the wrong test of prejudice, they would have said so. Justice Mosk even noted that under *Strickland*, "a 'reasonable probability' is not a 'more likely than not' probability, . . ." *In re Visciotti*, 14 Cal.4th at 361, quoting *Strickland* at 693, 694 (additional citation omitted) (Mosk, J., dissenting), Appendix D at 163. Although he argued for a different result, Justice Mosk never suggested that the majority did not understand and apply the correct standard of prejudice under *Strickland*. Moreover, in her concurring opinion, Justice Kennard noted the standard for prejudice under *Strickland* was a "'reasonable probability'" of a different outcome. *In re Visciotti*, 14 Cal.4th at 358 (Kennard, J. concurring), Appendix D at 156. Had the majority opinion not used this standard, surely Justice Kennard would also have so noted in her concurring opinion. It is thus abundantly clear that all seven justices of the California Supreme Court correctly understood the "reasonable probability" standard under *Strickland*, and agreed the majority opinion applied that standard.

The California Supreme Court used the term "probable" four times as shorthand for the "reasonable probability" standard under *Strickland*. The Ninth Circuit fails to recognize this, ignores the California Supreme Court's expressions of the "reasonable probability" standard and other references and quotations from *Strickland*, and makes no attempt to harmonize the California Supreme Court's recitation of the "reasonable probability" standard with the shorthand reference to "probable." Such an approach is inexplicable and illogical. It ignores the "highly deferential standard for evaluating state-court rulings" of

28 U.S.C. section 2254(d)(1) (*Lindh*, 521 U.S. at 333 n.7), and the requirement to give effect to state-court convictions "to the extent possible under law" (*Bell*, 122 S. Ct. at 1849, slip op. at 6, citing *Williams*, 529 U.S. at 403-04).

Moreover, the Ninth Circuit's ruling imposes an unwarranted and unfair burden on state courts. State courts must abandon ~~the use of~~ shorthand terms for standards under this Court's precedents, or risk the decision being found "contrary to" this Court's precedent on federal habeas. State courts will need to take pains to avoid or explain any deviation from the precise language used by this Court to avoid that risk. This is unfair, penalizes brevity, and will unnecessarily consume a portion of the state courts' limited resources.

Certiorari should be granted to clarify that a state court's written decision is not "contrary to" Supreme Court precedent, and may not be overturned, merely because the state court decision uses a shorthand term to describe the appropriate standard which has been explicitly set forth under this Court's precedent.

D. The Ninth Circuit Conclusion That The California Supreme Court's Decision Was Also An "Unreasonable Application" Of *Strickland's* Prejudice Requirement Rests On The Improper Assumption That The California Supreme Court Did Not Consider Relevant Matters Because The California Supreme Court Did Not Expressly State It Considered Such Matters

In finding Visciotti was prejudiced by deficient representation at the penalty phase, the Ninth Circuit violates the requirements of section 2254(d)(1) in two ways. First, it determines it must let stand the District Court's reversal of the death sentence before it even discusses, let alone determines, whether the California Supreme Court unreasonably applied this

Court's precedent under section 2254(d)(1). Second, when the Ninth Circuit does consider the issue under section 2254(d)(1), it violates the requirements of the section by assuming state court error where none is affirmatively shown.

Early in its opinion the Ninth Circuit noted the standard of review under section 2254(d)(1). *Visciotti v. Woodford*, 288 F.3d at 1104, Appendix A at 21-22. However, in its discussion of prejudice under *Strickland*, the Ninth Circuit decides there was prejudice without reference to, or mention of AEDPA, or the California Supreme Court's adjudication of this very claim. The Ninth Circuit, quoting from one of its own pre-AEDPA cases, states it must affirm the district court's reversal of Visciotti's death sentence if it "'cannot conclude with confidence the jury would unanimously have sentenced him to death if [Agajanian] had presented and explained all of the available mitigating evidence.'" *Visciotti v. Woodford*, 288 F.3d at 1117, quoting *Mayfield v. Woodford*, 270 F.3d 915, 929 (9th Cir. 2001) (en banc), Appendix A at 64. The Ninth Circuit then finds prejudice because of the unpresented mitigating evidence, the inaccurate portrayal of Visciotti as the family's one bad seed, the failure to counter the prosecution's case in aggravation, and the closing argument which conceded several potential mitigating factors and gave no reason to spare Visciotti's life. *Visciotti v. Woodford*, 288 F.3d at 1117-18, quoting *Strickland* 466 U.S. at 700, and citing other cases, Appendix A at 64-68. This determination is totally outside of, and contrary to, the dictates of section 2254(d)(1). The Ninth Circuit decides there was prejudice before considering or even mentioning the state court decision on that issue or the requirements of section 2254(d)(1).

Only then does the Ninth Circuit purport to evaluate whether the California Supreme Court's rejection of the claim was an unreasonable application of this Court's holding in *Strickland*. However, that evaluation is also contrary to the requirements of section 2254(d)(1). The Ninth Circuit fails to apply section 2254(d)(1)'s "highly deferential" standard of

review (*Lindh*, 521 U.S. at 333 n.7) and fails to give effect to the state court conviction "to the extent possible under law" (*Bell*, 122 S.Ct. at 1849, slip op. at 6, citing *Williams*, 529 U.S. at 403-04).

Instead of assuming the California Supreme Court discussed only the most significant matters while taking all relevant matters into consideration, the Ninth Circuit assumes the California Supreme Court did not consider relevant matters which the California Supreme Court did not mention in its discussion of the determination of prejudice. The Ninth Circuit made this assumption despite the fact the California Supreme Court discussed the matters in its review of the record. The Ninth Circuit then uses the presumed failure to consider such matters as the basis for its finding that the California Supreme Court adjudication was objectively unreasonable under section 2254(d)(1). It then proceeds to effectively decide the claim de novo. This method is incompatible with the deference required under AEDPA.

The Ninth Circuit's approach means that if state courts do not expressly discuss and reject every possible relevant matter, a federal court may later find the matter was not considered, and on that basis conclude the state court's adjudication of the claim was an "unreasonable" adjudication under section 2254(d)(1). State courts will need to write their decisions not just in the manner that best resolves the issue, but also with an eye to every aspect of every issue that a federal court might possibly think was relevant. This is an unwarranted and unreasonable burden on the state courts.

The Ninth Circuit starts down its path of avoiding deference by stating the California Supreme Court failed to "'evaluate the totality of the available mitigation evidence - both that adduced at trial, and the evidence adduced in the habeas proceeding - in reweighing it against the evidence in aggravation.'" *Visciotti v. Woodford*, 288 F.3d at 1118, quoting *Williams*, 529 U.S. at 398, citation omitted, Appendix A at 65. The Ninth Circuit then quotes from one paragraph of the California Supreme Court

discussion of the prejudice determination, noting the California Supreme Court stated it found the failure to present evidence of Visciotti's "'troubled family background' was not prejudicial because it would not have outweighed the aggravating evidence of '[t]he circumstances of the crime' and 'the earlier knifing of William Scofield and the pregnant Kathy Cusack.' *In re Visciotti*, 14 Cal. 4th at 355." *Visciotti v. Woodford*, 288 F.3d at 1118, Appendix A at 66. The Ninth Circuit states the California Supreme Court "completely ignored the mitigating effect of Visciotti's brain damage or adjustment to incarceration," and "failed to consider the prejudicial impact" of trial counsel's inaccurate portrayal of Visciotti as the one bad seed of the family and trial counsel's "multiple concessions during closing argument." *Visciotti v. Woodford*, 288 F.3d at 1118, Appendix A at 65-67.

Contrary to the Ninth Circuit's assumption, the California Supreme Court considered the entire record in the case, including the evidence and proceedings at trial and the evidence from the state habeas evidentiary hearing, in its determination of prejudice. It noted it could assess prejudice because it had "reviewed the entire record on appeal." *In re Visciotti*, 14 Cal.4th at 349; Appendix D at 132.[3] It also indicated it made an "independent review of the evidence" presented at the habeas evidentiary hearing.[4] *Id.*, Appendix D at 132. The California Supreme Court's written decision summarized the evidence and proceedings at the guilt and penalty phases of trial (*Id.* at 330-31, Appendix D at 82-87), reviewed Visciotti's allegations of ineffective assistance of counsel at the penalty phase of trial (*Id.*

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3. This comment was in regard to Visciotti's complaint that the state habeas hearing referee made no recommendation regarding relief.

4. This comment was in response to Visciotti's complaint that the referee had made findings beyond the scope of the questions presented to it by the California Supreme Court.

at 331-34, Appendix D at 87-94), reviewed the state habeas hearing evidence of trial counsel's acts and omissions (*Id.* at 336-41, Appendix D at 97-110) and unpresented mitigating evidence (*Id.* at 341-45, Appendix D at 111-21), and reviewed the report of the state habeas evidentiary hearing referee, including Visciott's attacks on the report (*Id.* at 345-51, Appendix D at 122-37).

The California Supreme Court next discussed the law governing the determination of the claim of ineffective assistance of counsel at the penalty phase (*Id.* at 351-354, Appendix D at 137-44) and then evaluated the claim. It assumed, arguendo, deficient performance of trial counsel (*Id.* at 353), and determined the claim on "the ground of lack of prejudice" without determining whether there was deficient performance (a method approved in *Strickland*, 466 U.S. at 697).

In making the prejudice determination, the California Supreme Court expressly noted there had been mitigating evidence presented at the guilt and penalty phases of Visciotti's trial - the testimony of the psychologist regarding Visciotti's brain injury and its effects, and the testimony of family members regarding Visciotti's positive character traits (*In re Visciotti*, 14 Cal. 4th at 354) - and that trial counsel inappropriately conceded that the evidence of brain damage and its effects was not mitigating (*Id.* at 354-55 n.7). The California Supreme Court noted trial counsel failed to prepare for the aggravating evidence of the stabbing, but found no prejudice from this because Visciotti had not shown there was anything to rebut this evidence. *Id.* at 355. The California Supreme Court's "principal concern" was the unpresented mitigating evidence of Visciotti's "family background" and the expert testimony regarding it and relating it to his drug abuse and use of violence. *Id.* at 355. The California Supreme Court found the "family background" evidence would not have outweighed the aggravating evidence because the circumstances of the crimes and the stabbings of Scofield and Cusack were overwhelming, and because the family background evidence was "minimal" compared to the

aggravating evidence. *Id.* at 355-56. It also found that because the evidence did not show Visciotti was under the influence of drugs at the time of the crimes, there was no merit to his theory that his family background mitigated the crimes because they were a product of his drug abuse, which in turn was caused by his family background *Id.* at 355-56.

In addition to this discussion in the determination of prejudice portion of the decision, the California Supreme Court discussed matters in other portions of its decision which the Ninth Circuit claims were not considered by the California Supreme Court. The California Supreme Court described the evidence of minimal brain injury at the guilt phase of trial, the state habeas allegation of suspected brain damage, and the state habeas evidence that a psychiatrist appointed to examine Visciotti before trial for competence and sanity recommended medical tests for possible organic brain disorder. *In re Visciotti*, 14 Cal.4th at 331, 334, 338-39; Appendix D at 85, 93, 104. The California Supreme Court decision also discussed the unpresented evidence of Visciotti's adjustment to incarceration. It noted the allegation that Visciotti's behavior improved when in juvenile camp and the testimony of the psychiatrist at the state habeas evidentiary hearing that Visciotti's "behavior and schooling improved markedly" while he was in custody in the California Youth Authority. *In re Visciotti*, 14 Cal. 4th at 334, 343; Appendix D at 93, 117.

Although the California Supreme Court did not discuss all of the concessions in trial counsel's argument cited by the Ninth Circuit, it discussed the most significant concession and the one bad seed argument, and inadequacies in trial counsel's argument in general. The California Supreme Court noted trial counsel argued to spare Visciotti's life because "he was the only bad child of a loving family that would suffer if [he] were executed," the allegation that this was a misleading argument, and the evidence at the state evidentiary hearing which showed it was untrue because siblings had substance abuse criminal records and the father had a criminal record. *In re Visciotti*, 14 Cal. 4th at

331, 333, 345; Appendix D at 86-87, 92, 121. The California Supreme Court's decision also noted Visciotti's allegation that trial counsel improperly conceded in argument that there was no mitigation from mental and emotional problems, and found that trial counsel erred when he conceded in argument that the evidence of brain damage was not mitigating. *In re Visciotti*, 14 Cal. 4th at 333, 353, 354, 354 n.7; Appendix D at 90-91, 142-43, 145, 145-46. The California Supreme Court described trial counsel's argument as "'a rambling discourse, not tied to particular evidence'" in which he asked for a life sentence to prevent Visciotti's family from suffering from the execution of its only bad child. *In re Visciotti*, 14 Cal. 4th at 331; Appendix D. at 86-87, quoting *People v. Visciotti*, 2 Cal. 4th at 82.

The California Supreme Court applied the correct law. It provided Visciotti the opportunity to present evidence at a state evidentiary hearing on his claim of ineffective assistance of counsel at the penalty phase of trial. It considered that evidence, the evidence at trial, and Visciotti's allegations. It then made a reasoned decision finding any deficient performance by counsel was not prejudicial, under *Strickland*. There is no valid basis to find this was "an unreasonable application of" *Strickland*. The Ninth Circuit finds it unreasonable only by ignoring the deference required under section 2254(d)(1) and assuming the California Supreme Court did not consider certain relevant matters. The Ninth Circuit bases its assumption on the fact the California Supreme Court did not discuss all of these matters in its discussion of prejudice. Common sense and section 2254(d)(1) call for the contrary assumption, to wit, that the California Supreme Court discussed only those matters it deemed most important and worthy of discussion. This assumption is consistent with the highly deferential standard of review of section 2254(d)(1) and the section's call to give effect to the state court conviction "to the extent possible under law." *Bell*, 122 S. Ct. at 1849, slip op. at 6, *citing Williams*, 529 U.S. at 403-04. The Ninth Circuit ignores these requirements in making its assumption.

The Ninth Circuit also ignores the requirements of section 2254(d)(1) in concluding, contrary to the California Supreme Court's conclusion, that the aggravating evidence was not overwhelming. The Ninth Circuit relies on the fact the jury deliberated for one day and then asked for definitions of two terms ("moral justification" and "extreme duress") used in the penalty phase instructions. It also uses this fact to support its conclusion that the jury "struggled" with its penalty decision. *Visciotti v. Woodford*, 288 F.3d at 1118, Appendix A at 67.

Instead of giving deference to the California Supreme Court determination that the aggravating factors were overwhelming, the Ninth Circuit engages in pure speculation to justify its disagreement with the California Supreme Court. The jury's actions do not support the Ninth Circuit's conclusion that the aggravating factors were not overwhelming. The jury's decision was literally one of life or death. In any case, let alone a death penalty case, there can be countless reasons for the time taken in deliberations. One day of deliberations followed by a request for the definition of two instructional terms does not support the Ninth Circuit's conclusion that the jury struggled over whether to impose death or life. As stated by a California appellate court, the "length of deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." *People v. Walker*, 31 Cal. App. 4th 432, 436-39, 37 Cal. Rptr. 2d 167 (1995). Moreover, even one dissenting justice agreed with the California Supreme Court majority opinion that the aggravating factors were overwhelming and the mitigating factors were minimal compared to the aggravating factors. *In re Visciotti*, 14 Cal.4th at 366, quoting the majority opinion at 355, 356 (Brown, J., dissenting), Appendix D at 175. The Ninth Circuit used an improper basis to find the aggravating factors were not overwhelming; it ignored logic and the standards of section 2254(d)(1) in finding the California Supreme Court's rejection

of Visciotti's claim of ineffective assistance of counsel at the penalty phase trial was an "unreasonable application of" *Strickland*.

Under the Ninth Circuit's ruling, state courts must expressly mention, in the discussion of the determination of each issue involving this Court's precedent, every possible factor a federal court might later deem relevant on the issue. Otherwise the state court's decision is in jeopardy of being overturned on federal habeas as "an unreasonable application of" this Court's precedent for failure to consider any unmentioned factor a federal court subsequently deems relevant. This imposes an unreasonable burden on the state courts' limited resources. It adds another layer of consideration to the state court consideration process and penalizes brevity. Most importantly, the Ninth Circuit's approach is fundamentally at odds with the requirement of deference, which is central to AEDPA.

Certiorari is necessary to clarify that under 28 U.S.C. section 2254(d)(1) a federal court may not assume a state court did not consider relevant factors in evaluating an issue merely because the state court's written evaluation of the issue does not restate it has considered such factors when the state court has earlier discussed the factors, as the California Supreme Court did here.

CONCLUSION

For the foregoing reasons, certiorari should be granted by this Court.

Dated: July 18, 2002

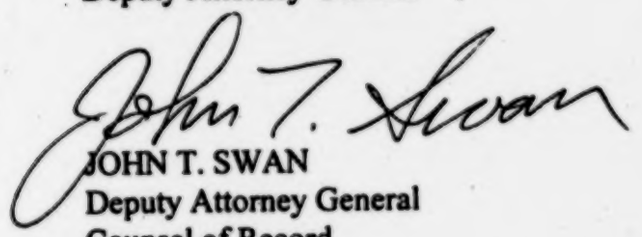
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